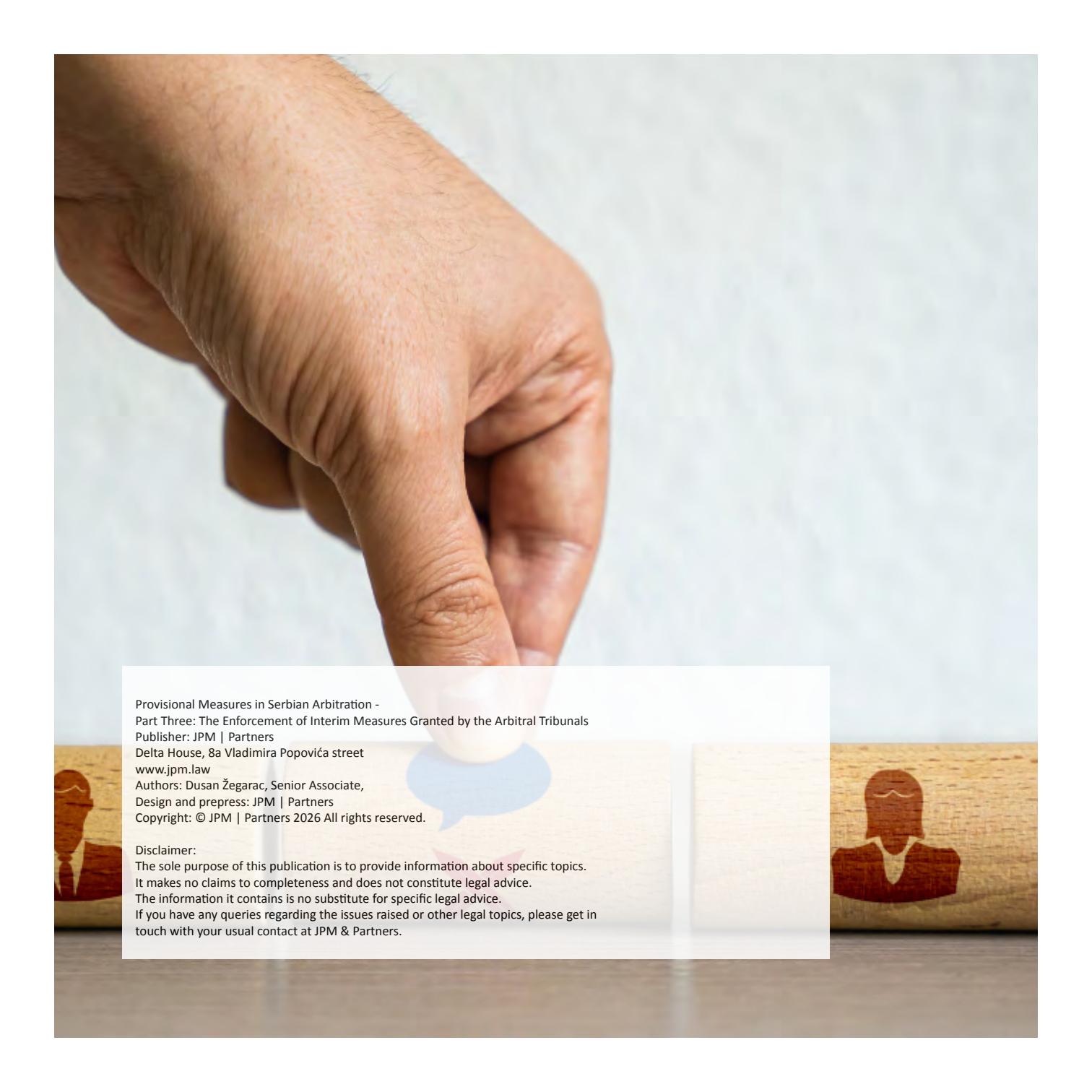




**Provisional Measures in Serbian Arbitration
Part Three: The Enforcement of Interim Measures Granted by
the Arbitral Tribunals**

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Provisional Measures in Serbian Arbitration -
Part Three: The Enforcement of Interim Measures Granted by the Arbitral Tribunals
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I Introduction

Primarily due to their coercive authority, interim measures constitute an essential instrument in arbitration, as they safeguard the parties' positions and mitigate the risk of harm during or before the arbitral proceedings.

The 2006 amendments to the UNCITRAL Model Law on International Commercial Arbitration marked a turning point by explicitly recognizing arbitral tribunals' power to grant enforceable interim measures. This development has since been reflected in the procedural rules of major arbitral institutions, which now often include provisions for both interim and emergency relief.

Despite these advancements, a key challenge remains: the enforcement of interim measures issued by arbitral tribunals, particularly across different jurisdictions. While some states have adopted legislative frameworks to support enforcement, others continue to rely on domestic court systems, creating uncertainty and potential delays. This paper examines the legal basis for the enforcement of interim measures, the role of national courts, and the evolving practices of arbitral institutions, with particular attention to regional developments.

This series of articles seeks to provide a comprehensive analysis of the legal framework governing provisional measures in arbitration under the laws of the Republic of Serbia. It aims to examine the statutory basis, procedural conditions, jurisdictional aspects, and practical implications of granting such measures.

The first part of this series of articles focused on provisional measures issued by Serbian national courts in relation to arbitration proceedings, while addressing the legal conditions under which national courts may grant such measures. The second part examined interim measures granted by arbitral tribunals, exploring the legal mechanisms that ensure their effectiveness, the interplay between arbitral and judicial authorities, and the extent to which national legislation aligns with international standards.

This third and final part of the series will focus on the enforcement of interim measures granted by arbitral tribunals, with particular emphasis on the applicable statutory frameworks governing their execution. It will examine the legal avenues through which these measures attain practical effect and the interaction between arbitral tribunals and domestic courts.

II Conditions for Granting an Interim Measure

This article observes that, according to Serbian arbitral theory and practice, arbitral institutions are not vested with the authority to enforce provisional measures issued by the tribunal.

Article 31 of the Serbian **Law on Arbitration** (Zakon o Arbitraži)¹ regulates the arbitral tribunal's power to grant provisional measures, as it states that the arbitral tribunal may, at the request of either party, *order any provisional measure it deems necessary in relation to the subject matter of the dispute. In doing so, the tribunal may also require the requesting party to provide appropriate security* as a condition for issuing the measure. However, neither the Law on Arbitration nor the Rulebooks of the two Serbian arbitral institutions² regulate the enforcement of the said provisional measures.

The conditions for enforcing provisional measures, by contrast, are regulated by the Law on Enforcement and Security (Zakon o izvršenju i obezbeđenju)³, which prescribes the conditions and procedural framework for their enforcement, which is within the authority of the national courts.

Accordingly, the applicable legal provisions generally grant the arbitral tribunal the right to order provisional measures, but not the right to enforce them. This right is reserved for national courts.

But what happens if an arbitral tribunal attempts to enforce a provisional measure independently during the course of the proceedings?

This was the case in one arbitral proceeding conducted before the Permanent Arbitration of the Serbian Chamber of Commerce.

In the case at hand, the arbitral tribunal ordered a provisional measure of security at the request of the claimant, initiated and maintained direct communication with the enforcement authority of the National Bank of Serbia and the public enforcement officer, and instructed the transfer of funds from the respondent's bank account to the account of the public enforcement officer.

Thus, a question is raised on the authority of the arbitral tribunal to act in such a way.

Pursuant to Article 419 of the Law on Enforcement and Security, the state court has exclusive jurisdiction to issue orders in proceedings regarding security measures, as well as orders concerning the posting of security.

On the other hand, the Law on Arbitration prescribes which disputes may be submitted to arbitration. Article 5, paragraph 1 of that Law stipulates that *"arbitration may be agreed upon for the resolution of property disputes concerning rights which the parties may freely dispose of, except for disputes for which exclusive jurisdiction of the court has been established."*

From the above-cited provision of the Law on Enforcement and Security, it is clear that the state court has exclusive jurisdiction to enforce interim measures. Consequently, a privately established body, such as an arbitral tribunal, should not have the authority to issue and order enforcement of such orders against entities vested with public authorities.

The Law on Arbitration and the Rules of the Permanent Arbitration at the Chamber of Commerce and Industry of Serbia do provide that the arbitral tribunal may order any interim measure it deems necessary in view of the subject matter of the dispute, and may simultaneously require the opposing party to provide appropriate security. However, the Law on Arbitration does not further elaborate on the scope of these powers.

Nevertheless, given the nature of arbitration, such powers are limited by the arbitration agreement concluded between the parties. In other words, arbitral decisions may be directed at, and have legal effect only with respect to, the parties to the arbitration—certainly not third parties.

An arbitral tribunal may, for example, order one party to post security, but it has no power to compel compliance with such an order. Even more so, it cannot issue binding instructions to public authorities or officials tasked with exercising public powers to enforce such an order. This is precisely why Article 15 of the Law on Arbitration allows the parties to seek interim measures from state courts—measures which necessarily involve an element of coercion.

This has widely been accepted in Serbian legal theory, as stated by the prominent Serbian professors and arbitral practitioners:

„Thirdly, and perhaps the most significant weakness of arbitral tribunals, lies in the fact that—unlike state courts—arbitration lacks a coercive apparatus to ensure the enforcement of interim measures. [...] The very term “interim measures” as used in the Law on Arbitration fully corresponds to the terminology employed in our Law on Enforcement and Security. However, it would be incorrect to conclude that the Law on Arbitration thereby simply permits arbitral tribunals operating within the territory of Serbia to apply the provisions of the Law on Enforcement and Security when issuing interim measures. From a purely formal standpoint, the provisions of the Law on Enforcement and Security are designed for judicial, not arbitral proceedings, and therefore should not be applied to arbitration, even on a subsidiary basis.“

Likewise, Professor Dr. Marko Knežević argues that:

“Arbitrators, as natural persons and not representatives of the state, exercise judicial authority only within the limits permitted by the state. An arbitral tribunal is vested with the mandate to resolve a specific civil dispute. Accordingly, in exercising its judicial function, an arbitral tribunal cannot go beyond rendering an authoritative decision in that particular dispute. In this sense, arbitration is often described as a functional substitute for litigation.

By contrast, security proceedings are enforcement proceedings, in which coercive security measures are ordered. The very presence of coercion, by its nature, precludes the participation of arbitrators. A decision ordering an interim measure has the character of an enforcement order—it is the initial act of coercion. Otherwise, it would imply that a non-state entity is being granted prerogatives of state authority, which cannot be delegated to anyone—the use of coercion.”⁴

It is further recognized that the arbitral tribunal does not have the authority to issue orders to the National Bank of Serbia and public enforcement officers.

Namely, the legal basis for establishing the jurisdiction of arbitration instead of the state court, as well as for conducting arbitral proceedings, is the arbitration agreement concluded between two or more contracting parties. Pursuant to Article 27 of the Law on Arbitration, the arbitral tribunal derives its jurisdiction from the arbitration agreement. Since the arbitration agreement has legal effect only between the parties who concluded it, the arbitral tribunal’s jurisdiction extends solely to those parties. Accordingly, the arbitral tribunal cannot have the authority to issue orders to third parties, and especially not to public enforcement bodies such as the National Bank of Serbia or public enforcement officers.

This is also the position of professors Dr. Gašo Knežević and Dr. Vladimir Pavić, who stated that: *“First, the strength of arbitration lies in the arbitration agreement: the tribunal derives its jurisdiction from it, but at the same time must respect the limitations arising from such a mandate based on intuitu personae. Jurisdiction is granted by the parties and extends only to the parties involved in the proceedings. Therefore, arbitration is powerless against third parties, and the issuance of interim measures ordering, for example, a bank to freeze the respondent’s account is not binding for it.”*⁵

Correspondingly, Professor Dr. Maja Stanivuković stated that: *“A party may request the arbitral tribunal the issuance of an interim measure, provided that the arbitral tribunal has jurisdiction to order interim measures only in relation to the parties to the proceedings, and not with respect to third parties.”*⁶

Hence, the expressed opinions of the most prominent Serbian arbitral practitioners confirm that the state courts have exclusive jurisdiction to enforce interim measures and that arbitral tribunals cannot issue binding instructions to public authorities or officials tasked with exercising public powers to enforce them. The conduct of the arbitral tribunal in the aforementioned case was, therefore, in any event, unlawful, and should not serve as a precedent for future conduct in arbitral proceedings.

III Conclusion

In conclusion, while arbitral tribunals possess the authority to order interim measures within the scope of their jurisdiction over the parties to the arbitration, they fundamentally lack the coercive power necessary to enforce such measures against third parties or public authorities.

The exclusive competence of state courts to issue and enforce interim security measures, as established by the Law on Enforcement and Security, remains unchallenged. The arbitration agreement, which forms the legal foundation of the tribunal's jurisdiction, binds only the parties to the dispute and does not extend enforcement powers to third parties or state enforcement bodies such as the National Bank of Serbia and public enforcement officers.

This limitation preserves the principle that the use of coercion is a prerogative of the state, which cannot be delegated to private arbitral institutions. Consequently, the enforcement of any provisional security must be sought through state courts, underscoring the complementary roles of arbitration and judicial authorities in the resolution and enforcement of disputes.

Endnotes:

- 1 Law on Arbitration, Republic of Serbia (“Sl. glasnik RS”, br. 46/2006).
- 2 Rules of the Permanent Arbitration at The Chamber of Commerce and Industry of Serbia (“Official Gazette of the RS” No. 101/16); Rules of the Belgrade Arbitration Center.
- 3 Law on Enforcement and Security („Official Gazette of RS“ No. 106/2015, 106/2016 - authentic interpretation, 113/2017 - authentic interpretation, 54/2019, 9/2020 - authentic interpretation and 10/2023 – other law).
- 4 Gašo Knežević, Vladimir Pavić, Arbitraža i ADR, third edition, Beograd, 2013, chapter III.
- 5 Marko Knežević, O privremenim merama arbitražnog suda, Glasnik Advokatske komore Vojvodine, No. 2008/6.
- 6 Maja Stanivuković, Međunarodna arbitraža, JP Službeni glasnik, 2013, chapter 11.

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